90-1880

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ERNEST D. PREATE, JR.
Attorney General
JOHN W. PECK
Special Deputy Attorney General
ROBERT A. GRACI
Chief Deputy Attorney General
(Counsel of Record)
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. Where a defendant testifies about his background and personal history as a mitigating circumstance during the penalty phase of a capital trial, may the prosecutor, consistent with the Self-Incrimination Clause, comment on the defendant's failure to express remorse?

II. Did the court of appeals improperly announce a "new rule" on collateral review when it held that the Self-Incrimination Clause prohibits a prosecutor from commenting on a capital defendant's failure to express remorse while testifying at the penalty phase?

III. Where the state supreme court holds that a prosecutor's penalty phase closing argument was a proper reference to the defendant's demeanor and was neither prejudicial nor inflammatory

a. may a lower federal court determine that the challenged comment is not

a reference to demeanor and, applying the same constitutional standard, merely substitute its judgment for that of the state court and grant habeas corpus relief?

b. did the court of appeals err in holding that the argument rendered the penalty phase fundamentally unfair and that the error was not harmless?

IV. Where a counselled state prisoner failed or refused to present evidence in a State court proceeding held on the issue of the voluntariness of his guilty plea to a murder which formed the basis for an aggravating circumstance at the penalty phase of his capital trial, did the court of appeals err in holding that the petitioner had been denied a full and fair hearing in state court and in remanding the case for an evidentiary hearing in the federal district court?

TABLE OF CONTENTS

	PAGE
Table of Authorities.....	ii
Opinions Below.....	1
Statement of Jurisdiction.....	5
Constitutional and Statutory Provisions Involved.....	6
Statement of the Case.....	8
Reasons for Granting the Writ.....	39
Conclusion.....	64

TABLE OF AUTHORITIES

Cases	Page(s)
Agan v. State 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984).....	41
Baxter v. Palmigiano 425 U.S. 308, 96 S.Ct. 1551 (1976).....	54
Boyde v. California 110 S.Ct. 1190 (1990).....	58
Butler v. McKellar 110 S.Ct. 1212 (1990).....	53
Calloway v. Wainwright 409 F.2d 59 (5th Cir. 1969), cert. denied, 395 U.S. 909 (1969).....	52
Clark v. Commonwealth 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1979).....	41
Coleman v. Brown 802 F.2d 1227 (10th Cir. 1986), cert. denied, 482 U.S. 909 (1987).....	41
Commonwealth v. Chester ___ Pa. ___, 587 A.2d 1367 (1991).....	42,52
Commonwealth v. Holland 518 Pa. 405, 543 A.2d 1068 (1988).....	43

Cases(Contd.) Page(s)

Commonwealth v. Lesko
502 Pa. 474, 467 A.2d 288 (1983), cert. denied sub nom. Lesko v. Pennsylvania, 467 U.S. 1256 (1984)..... 25,40

Commonwealth v. Lesko
502 Pa. 511, 467 A.2d 307 (1983)..... 4

Commonwealth v. Lesko
509 Pa. 67, 501 A.2d 200 (1985), reargument denied, 509 Pa. 625, 506 A.2d 897 (1986), cert. denied sub nom. Lesko v. Pennsylvania, 479 U.S. 1101 (1987)..... 3,4,27

Donnelly v. DeChristoforo
416 U.S. 637 (1974)..... 56

Estelle v. Smith
451 U.S. 454 (1981)..... 37,44

Gaskins v. McKellar
916 F.2d 941 (4th Cir. 1990)..... 41

Griffin v. California
380 U.S. 609 (1965)..... 37,43

Harris v. Pulley
885 F.2d 1354 (9th Cir. 1988), cert. denied, 110 S.Ct. 854 (1990)..... 41

Cases(Contd.) Page(s)

Lesko v. Jeffes
689 F.Supp. 508 (W.D.Pa. 1988), reversed and remanded sub nom. Lesko v. Owens, 881 F.2d 44 (3rd Cir. 1989), cert. denied 110 S.Ct. 759 (1990)..... 2,3,33

Lesko v. Lehman
925 F.2d 1527 (3rd Cir. 1991)..... 2,50

McCleskey v. Zant
59 U.S. L.W. 4288 (1991)... 57,61

People v. Barrows
133 Ill.2d 226, 139 Ill.Dec. 728, 549 N.E.2d 240 (1989), cert. denied, 111 L.Ed.2d 832 (1990)..... 42

People v. Beardslee
53 Cal.3d 68, ___ Cal. Rptr. ___, ___ P.2d ___ (1991)..... 48

People v. Bell
49 Cal.3d 502, 262 Cal. Rptr. 1, 778 P.2d 129 (1989), cert. denied, 110 S.Ct. 2576 (1990)..... 43

People v. Carrera
49 Cal.3d 391, 261 Cal.Rptr. 348, 777 P.2d 121 (1989), cert. denied, 110 S.Ct. 1938 (1990)..... 42

Cases(Contd.) Page(s)

People v. Ghent
43 Cal.3d 739, 239 Cal.Rptr. 82, 739 P.2d 1250 (1987), cert. denied, 485 U.S. 929 (1988)..... 41

People v. Jackson
49 Cal.3d 1170, 264 Cal.Rptr. 852, 783 P.2d 211 (1989), cert. denied, 111 S.Ct. 226 (1990)..... 47

People v. Keenan
46 Cal.3d 478, 250 Cal.Rptr. 550, 758 P.2d 1081 (1988), cert. denied, 104 L.Ed.2d 169 (1989)..... 48

People v. Pensinger
52 Cal.3d 1210, 278 Cal.Rept. 640, ___ P.2d ___ (1991)... 46

People v. Ramirez
98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31 (1983), cert. denied, 481 U.S. 1053 (1987)..... 49

People v. Thompson
45 Cal.3d 86, 246 Cal.Rptr. 245, 753 P.2d 37 (1988), cert. denied, 488 U.S. 960 (1988)..... 48

People v. Williams
44 Cal.3d 883, 245 Cal. Rptr. 336, 751 P.2d 395 (1988), cert. denied, 109 S.Ct. 249 (1988)..... 49

Cases(Contd.)	Page(s)
Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989).....	41
Saffle v. Parks 110 S.Ct. 1257 (1990).....	52,53
Sawyer v. Smith 110 S.Ct. 2822 (1990).....	53
Smith v. Freeman 892 F.2d 331 (3rd Cir. 1990).....	62
State v. Artis 325 N.C. 278, 384 S.E.2d 470 (1989), vacated on other grounds, 108 L.Ed.2d 604 (1990).....	42
State v. Brown 320 N.C. 179, 358 S.Ed.2d 1 (1987), cert. denied, 484 U.S. 970 (1987).....	43
State v. Jeffries 105 Wash.2d 398, 717 P.2d 722 (1986), cert. denied, 479 U.S. 922 (1986).....	49
State v. Price 326 N.C. 56, 388 S.E.2d 84 (1990).....	40
State v. Wickline 50 Ohio St. 114, 552 N.E.2d 913 (1990), cert. denied, 112 L.Ed.2d 235 (1990).....	40

Cases(Contd.) Page(s)

Streetman v. Lynaugh
812 F.2d 950 (5th Cir. 1987)..... 63

Sumner v. Mata
449 U.S. 539 (1981)..... 58

Teague v. Lane
489 U.S. 288 (1989)..... 52,53

Townsend v. Sain
372 U.S. 293 (1963)..... 61,62

Tucker v. Francis
723 F.2d 1504 (11th Cir. 1984)..... 53

Tucker v. Kemp
762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986)..... 53

Vasquez v. Hillary
474 U.S. 254 (1986)..... 62

Walton v. Arizona
110 S.Ct. 3047 (1990)..... 50

Wilson v. United States
149 U.S. 60 (1893)..... 45

Constitutional Provisions

U.S. Const. amend V..... 6

U.S. Const. amend XIV..... 6

Statutes	Page(s)
28 U.S.C. § 1254(1).....	6
28 U.S.C. § 2101(c).....	5
28 U.S.C. § 2254.....	31
28 U.S.C. § 2254(a).....	8
28 U.S.C. § 2254(d).....	8
18 Pa.Cons.Stat.Ann. § 1102(b) (Purdon 1983).....	19
42 Pa.Cons.Stat.Ann. § 9544(a)(3)(Purdon 1982)..	27
42 Pa.Cons.Stat.Ann. §§ 9541 et seq.....	15
42 Pa.Cons.Stat.Ann. § 9711(d)(1)(Purdon 1982)..	15
42 Pa.Cons.Stat.Ann. § 9711(d)(10)(Purdon 1982).	15
42 Pa.Cons.Stat.Ann. § 9711(e)(8)(Purdon 1982)..	15

No.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the
Pennsylvania Department
of Corrections, et al.,
Petitioners,

v.

JOHN CHARLES LESKO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, filed February 11, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit

reversing the order of the district court is reported at 925 F.2d 1527 (1991). A copy of the opinion is contained in Volume I of the separately bound Appendix to this petition at Appendix B. The report and recommendation of the United States magistrate denying the writ of habeas corpus which was adopted as the opinion of the United States District Court for the Western District of Pennsylvania is unreported. A copy of the report and recommendation is contained in Volume I at Appendix D. The earlier opinion of the court of appeals reversing the order of the district court granting the writ of habeas corpus and remanding the case is reported at 881 F.2d 44 (1989). A copy of that opinion is contained in Volume I at Appendix E. The earlier memorandum opinion of the district court granting the writ is reported at 689 F.Supp.

508. A copy of that opinion is contained in Volume II at Appendix F.

The memorandum opinion of the Superior Court of Pennsylvania quashing an appeal from an order denying post-conviction relief is unreported. A copy of the opinion is contained in Volume II at Appendix G. The opinion of the Indiana County Court of Common Pleas denying post-conviction relief is unreported. A copy of that opinion is contained in Volume II at Appendix H.

The per curiam order of the Supreme Court of Pennsylvania denying reargument in the appeal from the denial of post-conviction relief in Westmoreland County is reported at 509 Pa. 625, 506 A.2d 897 (1986). A copy of that order is contained in Volume II at Appendix I. The opinion of the Supreme Court of Pennsylvania affirming the denial of post-conviction relief in Westmoreland

County is reported at 509 Pa. 67, 501 A.2d 200 (1985). A copy of that opinion is included in Volume II at Appendix J. The opinion and order of the Westmoreland County Court of Common Pleas denying post-conviction relief is contained in Volume II at Appendix K.

The opinion of the Supreme Court of Pennsylvania affirming the denial of the motion to withdraw the Indiana County guilty plea is reported at 502 Pa. 511, 467 A.2d 307 (1983). A copy of that opinion is included in the Volume II at Appendix L. The opinion and order of the Indiana County Court of Common Pleas denying the motion to withdraw the guilty plea is unreported. A copy of the opinion and order is contained in Volume III at Appendix M.

The opinion of the Supreme Court of Pennsylvania affirming the first degree murder conviction and sentence of death

on direct appeal is reported at 502 Pa. 474, 467 A.2d 288 (1983). A copy of the opinion is contained in Volume III at Appendix N. The opinion and order of the Court of Common Pleas of Westmoreland County denying post-verdict motions for new trial and in arrest of judgment is unreported. A copy of the opinion and order is contained in Volume IV at Appendix O.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 11, 1991. Rehearing and rehearing in banc were denied on March 11, 1991. That order is contained in Volume I of the Appendix at Appendix A. This petition for writ of certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's juris-

diction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself....

U.S. Const. amend V.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ...nor shall any State deprive any person of life, liberty or property without due process of law....

U.S. Const. amend. XIV.

Section 2254 of Title 28 provides, in pertinent part:

> (a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant

to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or an agent thereof were parties, evidenced by a written finding, written opinion or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately

> developed at the State court hearing;
>
> . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court...
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) through (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent...the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(a) and (d).

STATEMENT OF THE CASE

Respondent, John Charles Lesko (hereinafter "Lesko"), and a co-defendant, Michael Travaglia, were arrested, tried and convicted in Westmoreland

County, Pennsylvania, for the murder of Police Officer Leonard Miller.

The events leading to Officer Miller's death began in the late evening of January 2, 1980. Lesko met with his co-defendant, Michael Travaglia, and one Ricky Rutherford in downtown Pittsburgh. Travaglia told Lesko and Rutherford to go behind a hotel and wait for him. Shortly thereafter Travaglia arrived in a sports car being driven by a stranger, William Nicholls. At Travaglia's direction, Lesko and Rutherford got into the car. As they were doing so, Travaglia shot Nicholls in the arm.

Travaglia directed Nicholls to drive out of the city. Travaglia then began driving. Nicholls was placed in the back seat with Lesko. Lesko ordered Rutherford to handcuff Nicholls behind the back. Lesko repeatedly punched Nicholls. He asked him to perform oral sex on him

and called him a queer. He also taunted him with a knife. He took Nicholls' personal belongings and told Rutherford to place them in the glove compartment. When Nicholls lost consciousness, Lesko gagged him with a scarf.

Travaglia drove to a wooded area near a lake. Lesko propped Nicholls against a tree. His hands were cuffed, his feet were bound with a belt, and he was gagged. Travaglia and Lesko dragged Nicholls to the lake and rolled him in.

Lesko, Travaglia and Rutherford then drove Nicholls' car to Travaglia's father's house. While Lesko and Rutherford waited, Travaglia entered the house. He returned with a handgun which he handed to Lesko. When he inspected it he realized that it only had bird shot in it. Travaglia drove back to the house and told Rutherford where he could find bullets in his father's car which

was parked in the garage. Rutherford and Lesko exited the car. Lesko was armed with the gun which had been used by Travaglia to shoot Nicholls. He told Rutherford that if anything happened he "had six shots to get out." Rutherford retrieved the bullets and returned with Lesko to the car. Officer Miller was killed with these bullets.

After driving a while they saw Officer Miller parked near a convenience store. Travaglia said he "wanted to have some fun with this cop." He sped past the officer and beeped. The officer did not pursue. He again drove past and again the officer failed to respond. The third time Travaglia went past the officer he beeped and ran a red light. Officer Miller gave chase with his lights flashing. During the chase Lesko told Rutherford "to lay down in the back,

because it might turn into a shooting gallery."

After a brief chase Travaglia stopped the car and rolled down the window. As Officer Miller approached on foot Travaglia shot him twice with the gun which he and Lesko obtained from his father's house. After Officer Miller returned fire the trio sped away. They eventually returned to Pittsburgh.

Later that day Travaglia and Lesko met a friend, Daniel Keith Montgomery. Travaglia told him, "I shot a cop." Lesko said, "I wanted to" and laughed. Travaglia gave Montgomery the gun he used to shoot Officer Miller. Montgomery later gave it to the police and told them it had been used to kill a police officer.

That night, Lesko and Travaglia were arrested in a hotel room. Before surrendering, Lesko pointed a gun at the

police. They both gave statements admitting involvement in Officer Miller's killing. Lesko said they tried to draw the officer's attention away from the convenience store so that they could return and "knock off" the store. Lesko and Travaglia also implicated themselves in the Nicholls' homicide, as well as the homicides of Peter LeVato and Marlene Sue Newcomer.[1] The officer who took the statement testified, without objection, that during the interview Lesko never expressed any remorse, regret or sorrow for what had happened.

Both defendants contended at trial that they lacked the intent to kill, a requisite to first degree murder, the only capital offense in Pennsylvania. Lesko's counsel argued, based on Lesko's

---

[1]Only the portion of the statements concerning the Miller homicide were introduced at trial.

statement,[2] that they planned to rob the store. The killing, he argued, was not premeditated. It was the unintended result of a botched robbery attempt. He contended that Lesko was guilty of only second degree, felony murder. The prosecution argued that the killing of Officer Miller constituted murder of the first degree.

Lesko and his co-defendant were each found guilty of murder of the first degree and conspiracy. The trial then proceeded to the penalty phase in conformity with Pennsylvania's statute. The record from the guilt phase was incorporated for purposes of the penalty phase. The Commonwealth also introduced evidence of two statutory aggravating circumstances: (1) that Officer Miller

---

[2]Neither Lesko nor Travaglia testified at trial.

was killed in the performance of his duties, 42 Pa.Cons.Stat.Ann. § 9711(d)(1)(Purdon 1982); and (2) that Lesko had pleaded guilty to the crime of second degree murder in the Nicholls case for which a sentence of life imprisonment was imposable, 42 Pa.Cons.Stat.Ann. § 9711(d)(10)(Purdon 1982). The defense objected to the evidence related to the plea arguing, inter alia, that the Indiana prosecutor had agreed that the plea could not be used as an aggravating circumstance. The objection was overruled.

In an attempt to establish mitigating circumstances, Lesko introduced evidence, including his own testimony, concerning his personal history. 42 Pa.Cons.Stat.Ann. § 9711(e)(8)(Purdon 1982). His counsel argued that there was no rational reason for or purpose served by the death penalty and that the

testimony concerning Lesko's character and personal history was an important mitigating circumstance.

In his closing argument the prosecutor argued forcefully for the death penalty under the facts and circumstances of the case. He began his argument by reading the pertinent portion of the death penalty statute and describing the jury's function in determining if the evidence supported any aggravating or mitigating circumstances. After responding to defense counsel's Biblical arguments, the prosecutor reviewed the evidence supporting the aggravating circumstances. He then recounted the evidence offered to establish mitigating circumstances, arguing generally that they had not been established by a preponderance of the evidence but conceding that one might apply to Lesko. Responding to the "character"

argument made on Lesko's behalf, the prosecutor argued:

> Good character and record. All of the character witnesses limited their testimony to a certain period of time...We heard about John Lesko up to a certain point.
>
> And I want you to consider that John Lesko took the witness stand and you've got to consider his arrogance. He told you about how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I said. I don't want you to put me to death but I'm not even going to say I'm sorry.

Appendix B, at 28a-29a.

The prosecutor then responded to the defense contentions that the death penalty was not a deterrent and that it constituted cruel and unusual punishment.

The prosecutor ended his summation by returning to his opening theme of applying the statute and imposing the death penalty because the aggravating

circumstances outweighed the mitigating. He said:

> Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.
>
> I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty.

Appendix B, at 29a.

The defense objected to portions of the prosecutor's argument asserting that it constituted an impermissible appeal to vengeance and that it improperly commented on Lesko's failure to express remorse in violation of the Due Process and Self Incrimination Clauses. The trial court rejected both assertions. In its charge, the trial court did instruct the jury, however, that it was up to each defendant whether to testify and

that no adverse inference could be drawn from the fact that a defendant did not testify.

The jury was instructed in conformity with Pennsylvania's death penalty statute and returned sentences of death for both Lesko and his co-defendant. As to each, the jury unanimously found that both proffered aggravating circumstances were proven and that the aggravating circumstances outweighed all mitigating circumstances.

Lesko had previously pleaded guilty in Indiana County, Pennsylvania, to the crime of second degree, felony murder for the drowning death of William Nicholls. The mandatory sentence for second degree murder is life imprisonment. 18 Pa.Cons. Stat.Ann. § 1102(b)(Purdon 1983).

Shortly before the commencement of trial in this case, Lesko, through Indiana County counsel, John Armstrong,

Esquire, filed a motion to withdraw his guilty plea asserting a variety of grounds. After he was convicted and sentenced to death for his part in the murder of Officer Miller, Lesko, through Armstrong, amended this motion. He alleged that his plea agreement had been breached and that his guilty plea had been rendered involuntary as a result of its introduction as an aggravating circumstance in the penalty phase of the Westmoreland County trial.

The Indiana County court conducted a hearing on Lesko's amended motion. Armstrong presented no testimony. However, he explained that he placed the full plea agreement on the record during the plea colloquy at which Lesko and the Indiana County prosecutor assented to the completeness of Armstrong's recitation of its terms. Armstrong told the judge that the express agreement as set

forth at the plea proceeding carried with it an implied agreement that the plea would not be used as an aggravating circumstance during the sentencing proceeding. The Indiana County prosecutor testified and denied that there was any agreement of non-use, express or implied.

The Indiana County court denied the motion finding as facts that Lesko's plea was "voluntarily...entered" and that there was no condition of non-use in the plea agreement. Appendix M, at 338a-341a. The trial court made this determination based upon a review of the guilty plea colloquy, the testimony of the prosecutor, and the lack of any credible evidence to the contrary from Lesko. The trial court concluded that if there was any such agreement it would have been stated on the record. Id., at 341a.

Lesko appealed from the imposition of the sentence of death resulting from Officer Miller's killing in Westmoreland County (hereinafter "the Westmoreland County appeal"). He also appealed from the sentence of life imprisonment imposed after denial of the motion to withdraw his guilty plea in the Nicholls homicide (hereinafter "the Indiana County appeal"). The Supreme Court of Pennsylvania decided both of these appeals on the same day and rejected all of Lesko's claims.

In the Westmoreland County appeal, the Supreme Court determined, inter alia, that Lesko's plea of guilty was properly admitted to establish an aggravating circumstance during the penalty phase of the trial. Appendix N, at 397a-404a. The court also rejected all of Lesko's claims that the prosecutor engaged in improper argument during the

sentencing proceeding. Id., at 404a-417a.

The court determined that the prosecutor's comment on Lesko's failure to show remorse during his testimony at the penalty proceeding did not run afoul of his privilege against self-incrimination. The court opined that the privilege, in its pure form, has no direct application to a determination of the proper sentence to be imposed. Id., at 404a-409a.

The court held that the demeanor of a convicted defendant, including his apparent remorse, is a proper consideration in fixing sentence in a capital case. Id., at 408a-409a. Moreover, the trial court instructed the jury, within minutes after the prosecutor's argument, that the defendants had no obligation to testify and that the jury could draw no adverse inference from the failure to testify. Id., at 409a. Accordingly, the

Supreme Court found no error in this comment.

The court also rejected Lesko's claim that the prosecutor's argument that: "Right now, the score is John Lesko and Michael Travaglia two society nothing" and that it was the jury's duty to make the killing stop was an improper appeal to vengeance. The court determined that this argument was proper response to arguments made by the defense counsel. Taken in context, the Supreme Court held that the comment was permissible oratorical flair. Id., at 416a-417a.

In the Indiana County appeal, the court held that Armstrong's counsel in advising Lesko to plead guilty was not constitutionally ineffective. By extracting an agreement from the Indiana County prosecutor to delay the imposition of the mandatory sentence of life imprisonment on the plea to second degree

murder until after the Westmoreland County trial, he was trying to avoid the certainty that a conviction and sentence for the Nicholls murder would be used as an aggravating circumstance during the penalty phase. Appendix L, at 318a-325a.

The court also rejected Lesko's claim that his plea agreement had been breached by the use of the plea as proof of an aggravating circumstance. After examining the record, the court affirmed the trial court's finding that there was no agreement of non-use. Id., at 327a-328a.

After this Court denied certiorari in the Westmoreland County appeal, 467 U.S. 1256 (1984), Lesko collaterally attacked his death sentence by filing a petition under the Post Conviction Hearing Act (P.C.H.A). In that petition Lesko, through counsel, sought a hearing to present evidence on his claim that

his plea agreement had been breached by the introduction of his plea during the penalty phase. At the P.C.H.A. hearing, he proffered Armstrong's testimony. His attorneys said that Armstrong would testify that it was understood between the Indiana County prosecutor and him that the plea would not be introduced at the penalty phase and that Armstrong conveyed that understanding to Lesko as the essence of the plea agreement. The Commonwealth objected to this testimony on the basis that the issue, the terms of the plea agreement and the alleged breach, had been finally litigated during the Indiana County appeal. The Westmoreland County court agreed and refused to allow the testimony. Appendix K, at 301a-302a and 304a-306a. Lesko was denied relief on all his claims and appealed.

The Supreme Court affirmed. Appendix J. The court first decided that the question had been determined adversely to Lesko in the Indiana County appeal and was, therefore, finally litigated. Id., at 267a-277a.[3] The court, nonetheless, reexamined the merits of the claim and rejected it. Id., at 277a-289a. This Court thereafter denied certiorari. 479 U.S. 1101 (1987).

After the hearing on the P.C.H.A. petition in Westmoreland County at which Armstrong's testimony was proffered, Lesko filed a pro se P.C.H.A. petition in Indiana County. He claimed, inter alia, that Armstrong rendered ineffective assistance of counsel in that he miscommunicated the terms of the plea

---

[3]Such a finding barred P.C.H.A. relief. See 42 Pa.Cons.Stat.Ann. § 9544 (a)(3)(Purdon 1982) repealed and replaced by 42 Pa.Cons.Stat.Ann. §§ 9541 et seq. (Purdon Supp. 1990).

agreement. The same judge who had presided at the guilty plea colloquy and at the hearing on the amended motion to withdraw the plea denied the petition without a hearing. After reciting the terms of the plea agreement, he observed that it was Armstrong's strategy to delay imposition of sentence on the plea so that it would not be used as an aggravating circumstance in Westmoreland County. During the plea colloquy, the judge made sure that Lesko understood the plea agreement and that he entered into it willingly. The judge observed that the Supreme Court had ruled in the Indiana County appeal that Armstrong's advice had been reasonable, that he was not ineffective, that there was no breach of the agreement, and that Lesko knew its exact nature. Accordingly, he determined that Lesko's claim had been

finally litigated and could not be relitigated. Appendix H.

After his Indiana County P.C.H.A. petition was denied Lesko sought reconsideration. In his reconsideration motion he proffered that both he and Armstrong would testify that one of the material terms of the plea agreement upon which the plea was entered was that the plea would not be introduced at the Westmoreland County trial. The motion was denied and Lesko filed an appeal pro se. Thereafter, counsel was appointed to represent Lesko on his appeal.

In his brief filed in the appellate court, counsel argued that Lesko should have been given a hearing on his petition so that he could testify about his understanding of the plea agreement. He also argued that Armstrong was incompetent in his explanation of the agreement to Lesko and that he misled Lesko

into pleading guilty. The Superior Court quashed the appeal sua sponte because it was not filed in a timely fashion. Appendix G.

Lesko's appellate counsel sought discretionary review of that order by filing a petition for allowance of appeal with the Supreme Court. He asked that court to disregard the procedural default and to address the merits of Lesko's claim. He also asked the court to reconsider its earlier opinion in the Indiana County appeal because it did not have the benefit of an evidentiary hearing which addressed the issue of the plea bargain between Lesko and the Indiana County prosecutor. The Supreme Court denied the petition for allowance of appeal without further explanation. 357 Pa.Super. 636, 513 A.2d 1077 (1986).

During the pendency of Lesko's second petition for writ of certiorari,

Lesko filed a counselled petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 2254. Lesko's petition alleged eighteen violations of his rights secured by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In his petition, Lesko claimed, inter alia, that the admission of his guilty plea as an aggravating circumstance at his death penalty trial violated his Indiana County plea agreement and denied him due process of law. He asserted that he was entitled to an evidentiary hearing on this claim because the fact finding procedure in state court did not afford him a full and fair hearing and because the material facts were not adequately developed at the state court hearing. Respondents (petitioners herein) objected

to the request for an evidentiary hearing on the basis that the terms of the plea agreement had been determined adverse to Lesko in the Indiana County appeal and the appeal from the Westmoreland County court's denial of P.C.H.A. relief.[4]

The district court issued a conditional writ finding that Lesko had been denied due process by the introduction, during the guilt phase of the proceedings, of evidence surrounding the Nicholls homicide. Appendix F. Because of its disposition on that issue, the district court did not address the other claims raised by Lesko. Id., at 199a.

On appeal by Respondents (Petitioners herein) the United States Court

---

[4]At the time that this issue was originally briefed for the district court, petitioners herein were unaware of the opinion of the Indiana County judge denying P.C.H.A. relief who also found that the issue had been finally litigated.

of Appeals for the Third Circuit reversed the decision of the district court and remanded the matter for consideration of the remaining claims raised in the petition. Appendix E. This Court thereafter denied Lesko's third petition for writ of certiorari. 110 S.Ct. 759 (1990).

Upon remand, the district court referred the matter to a United States magistrate. The magistrate recommended that the petition be dismissed but that a certificate of probable cause to appeal be granted. Appendix D, at 68a.

In rejecting Lesko's claims that his plea agreement was violated by the use of his guilty plea during the penalty phase of the Westmoreland County trial and that he was entitled to a hearing on that issue in federal court, the magistrate noted Lesko's argument that it was necessary to consider not only the ex-

press terms of the agreement but also the implicit understanding of the parties and, most importantly, any representations concerning the agreement made to Lesko by his attorney. He determined that the terms of the agreement had been considered by the Indiana County court at the hearing on Lesko's amended motion to withdraw his plea and by the Supreme Court on the appeal from the order denying the motion. Likewise, the issue was considered by the Westmoreland Court as part of the P.C.H.A. petition and again by the Supreme Court on the appeal from the order denying the petition. He held that the factual conclusion by the trial and appellate courts that there was no agreement that the plea could not be used as an aggravating circumstance was entitled to a presumption of correctness which Lesko had not rebutted.

The magistrate concluded that there was a full record on the issue from the guilty plea colloquy and the hearing on the motion to withdraw the plea. He observed that, while plea counsel was unavailable to testify at the hearing on the motion (because he was representing Lesko at the hearing), counsel's representations that there was such an agreement were heard by both the Indiana County court and the Supreme Court and rejected. Accordingly, the magistrate recommended that a further hearing was not necessary. Id., at 77a-85a.

Turning to Lesko's claims concerning the prosecutor's closing argument during the penalty phase the magistrate determined that, in context, the "two-to-nothing" comment did not work a denial of due process and render the proceeding unfair. The comment was a response to the emotional attacks made on the

death penalty by defense counsel. Id., at 87a-90a.

Concerning the prosecutor's comment that when Lesko testified during the penalty phase he failed to show remorse, the magistrate initially opined that the comments were not directed at Lesko's failure to testify and thus were not in violation of the Fifth Amendment. Instead, the magistrate found that they were directed at Lesko's plea for leniency. He concluded that any possible prejudice resulting from these comments was mitigated by the trial court's instructions which explained that a criminal defendant has no obligation to testify. Id., at 90a-93a.

The district court adopted the report and recommendations of the magistrate as its opinion, dismissed the habeas corpus petition, and issued a

certificate of probable cause. Appendix C. Lesko, through counsel, appealed.

The United States Court of Appeals for the Third Circuit reversed the judgment of the district court to the extent that it sustained the imposition of the death penalty. Appendix B. The court of appeals held that the prosecutor's comment on Lesko's failure to express remorse during his testimony at the penalty proceeding infringed on his Fifth Amendment privilege against self-incrimination. The appeals court determined that the rule of Griffin v. California, 380 U.S. 609 (1965), is applicable to both the guilt and penalty phases of a death penalty trial. It found this conclusion mandated by Estelle v. Smith, 451 U.S. 454 (1981). Id., at 31-32a.

The court also ruled that Lesko did not waive the privilege by testifying about his background during the senten-

cing proceeding. This testimony was "collateral" according to the court. Id., at 34a-35a. In making this pronouncement the court determined that it was not announcing a new rule on habeas corpus review but was applying law which was well-established at the time of Lesko's trial. Id. The court of appeals determined that the prosecutor's remark was not merely a reference of Lesko's demeanor as a witness in his own behalf. Id., at 37a-38a.

The court of appeals also determined that the prosecutor's "two-to-nothing" comment and his imploring the jury that it was their duty to make the killing stop was an impermissible appeal to vengeance. Id., at 39a-42a. When coupled with the "no remorse" comment, Lesko was denied due process, according to the appeals court. Id., at 42a. Despite the trial court's cautionary instruc-

tions concerning a defendant's failure to testify, the court of appeals decided that these constitutional errors were not harmless. Id., at 42a-44a.

The court of appeals also held that, before the Indiana County guilty plea could be used as an aggravating circumstance at a new penalty hearing, Lesko was entitled to an evidentiary hearing, in federal court, on his claim that he pleaded guilty with the understanding that the plea could not be used in the Westmoreland County trial. Id., at 28a. The court concluded that the merits of this claim were never resolved in the state courts and that the presumption of correctness was, therefore, inapplicable. Id., at 27a- 28a.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with decisions of other courts

of appeals on the same matter and with decisions of state courts of last resort. It also conflicts with applicable decisions of this Court. In addition, the decision has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power. Accordingly, the writ should issue and the judgment of the court of appeals should be reversed.

1. Generally, it has been held that a defendant's lack of remorse is a relevant consideration during the penalty phase of a capital trial. Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288 (1983), cert. denied sub nom. Lesko v. Pennsylvania, 467 U.S. 1256 (1984) (instant case on direct appeal); State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990) (relates to demeanor observable at trial); State v. Wickline, 50 Ohio

St. 114, 552 N.E.2d 913 (1990), cert. denied, 112 L.Ed.2d 235 (1990) (shows aggravating circumstances outweigh mitigating); People v. Ghent, 43 Cal.3d 739, 239 Cal.Rptr. 82, 739 P.2d 1250 (1987), cert. denied, 485 U.S. 929 (1988) (demonstrates absence of mitigation); Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984) (negates mitigation); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1979) (relevant to future dangerousness). See also Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990) (relevant to aggravating circumstances); Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989) (could justify death penalty); Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988), cert. denied, 110 S.Ct. 854 (1990) (relevant to capital sentence); Coleman v. Brown, 802 F.2d 1227 (10th

Cir. 1986), cert. denied, 482 U.S. 909 (1987) (relevant to aggravating circumstance).

Several courts have permitted a prosecutor's comment during the penalty phase on a defendant's lack of remorse, whether or not the defendant has testified. Commonwealth v. Lesko, supra; Commonwealth v. Chester, ___ Pa. ____, 587 A.2d 1367 (1991) (defendant did not testify); State v. Price, supra (same); State v. Wickline, supra (unclear); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated on other grounds, 108 L.Ed.2d 604 (1990) (defendant testified at guilt phase); People v. Barrows, 133 Ill.2d 226, 139 Ill. Dec. 728, 549 N.E.2d 240 (1989), cert. denied, 111 L.Ed.2d 832 (1990) (defendant did not testify); People v. Carrera, 49 Cal.3d 391, 261 Cal.Rptr. 348, 777 P.2d 121 (1989), cert. denied, 110 S.Ct. 1938

(1990) (defendant testified); Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988) (defendant did not testify); State v. Brown, 320 N.C. 179, 358 S.Ed.2d 1 (1987), cert. denied, 484 U.S. 970 (1987) (same); People v. Ghent, supra (defendant testified at special circumstances hearing). But see People v. Bell, 49 Cal.3d 502, 262 Cal. Rptr. 1, 778 P.2d 129 (1989), cert. denied, 110 S.Ct. 2576 (1990) (comment improper where defendant did not admit responsibility or invite comment; dicta).

The court of appeals concluded that the prosecutor's "no remorse" comment during the penalty phase of Lesko's trial violated the rule announced in Griffin v. California, 380 U.S. 609 (1965) (Self-Incrimination Clause violated by prosecutor's argument that a defendant's failure to testify at the guilt phase of a capital trial could be

considered against him). According to the court of appeals, this conclusion was mandated by Estelle v. Smith, 451 U.S. 454 (1981). In Smith, the Court held that the privilege against compelled self-incrimination was violated when the state used the defendant's statement to a court-appointed psychiatrist at the sentencing phase of a capital trial to prove the defendant's future dangerousness, where the statement had not been preceded by Miranda warnings.

In deciding this issue, the court of appeals gave an expansive reading to Estelle v. Smith, supra, ignoring the limitation the Court placed on its holding ("[i]n these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated"). Id. at 466 (emphasis added). The court of appeals also ignored the rationale of Griffin in

applying it to the penalty phase of a capital trial.

In Griffin, the Court was intent on protecting "the presumption of innocence." Id. at 613, quoting Wilson v. United States, 149 U.S. 60, 66 (1893). At the penalty phase of a capital trial, the defendant has already been stripped of that presumption. He has been adjudged guilty of a capital offense. See Commonwealth v. Lesko, supra, at 499, 467 A.2d at 300 ("...the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed; the purpose of the prosecutor is not to 'incriminate,' and the goal of the defendant is not to avoid 'incrimination.' Likewise, the presumption of innocence which accompanies the accused throughout the proceedings to determine his guilt has no direct

application to the sentencing determination").[5]

Other state and federal courts have determined, in a variety of contexts, that a prosecutor's comments during argument at the penalty phase of a capital trial concerning a defendant's lack of remorse are not improper comments on the defendant's failure to testify. People v. Pensinger, 52 Cal.3d 1210, 278

---

[5]It is recognized that in Smith this Court rejected the argument that "'incrimination is complete once guilt has been adjudicated,' and, therefore, the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial." 451 U.S. at 462. In Smith, the state used the defendant's Miranda-violative statement to carry its burden of proving the defendant's future dangerousness. Here, Lesko voluntarily testified at the sentencing proceeding concerning his character and background. His lawyer said this was an important mitigating circumstance. The prosecutor argued that his failure to express remorse negated this circumstance. He did not argue that his failure to express remorse was an aggravating circumstance which would subject Lesko to the death penalty.

Cal.Rept. 640, ___ P.2d ___ (1991); State v. Price, supra (argument did not exploit defendant's silence at trial or his unwillingness to admit guilt); People v. Jackson, 49 Cal.3d 1170, 264 Cal.Rptr. 852, 783 P.2d 211 (1989), cert. denied, 111 S.Ct. 226 (1990) (comment did not refer directly or indirectly to defendant's effort to maintain innocence); Commonwealth v. Holland, supra (rejecting claim based on holding in supreme court's decision in the instant case). See also Gaskins v. McKellar, supra (in context, not an improper comment on defendant's refusal to testify at guilt phase).

Some courts have expressly considered the applicability of Griffin to a prosecutor's penalty phase comment that a capital defendant lacks remorse. For the most part, those courts assume the applicability of Griffin to penalty

phase arguments without further elaboration. In People v. Beardslee, 53 Cal.3d 68, ___ Cal. Rptr. _____, ___ P.2d ___ (1991), the defendant did not testify at the penalty phase. Based on the defendant's confession, the prosecutor argued a lack of remorse. The court rejected a Griffin challenge. In People v. Thompson, 45 Cal.3d 86, 246 Cal.Rptr. 245, 753 P.2d 37 (1988), cert. denied, 488 U.S. 960 (1988), the court said that it would be improper for a prosecutor to suggest that the jury draw an adverse inference from a defendant's exercise of his right not to testify, citing Griffin and Smith. The court held, however, that the reference to lack of remorse was permissible to the extent it negated mitigating evidence. See also People v. Keenan, 46 Cal.3d 478, 250 Cal.Rptr. 550, 758 P.2d 1081 (1988), cert. denied, 104 L.Ed.2d

169 (1989) (same); People v. Ghent, supra (same; if there was Griffin error it was harmless); People v. Williams, 44 Cal.3d 883, 245 Cal. Rptr. 336, 751 P.2d 395 (1988), cert. denied, 109 S.Ct. 249 (1988) (same; no Griffin error where prosecutor neither directly nor indirectly calls jury's attention to defendant's failure to testify).

The Supreme Court of Washington has suggested that the rule of Griffin may not apply to the penalty phase of a capital trial. See State v. Jeffries, 105 Wash.2d 398, 717 P.2d 722 (1986), cert. denied, 479 U.S. 922 (1986). But see People v. Ramirez, 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31 (1983), cert. denied, 481 U.S. 1053 (1987) (under Griffin and Smith, a defendant who does not testify at the penalty phase is entitled to an instruction that his silence cannot be used against him).

In Walton v. Arizona, 110 S.Ct. 3047 (1990), a plurality of the Court determined that the Constitution permitted placing the burden of proving mitigating circumstances by a preponderance of the evidence upon a defendant. In deciding the instant case on direct appeal the state supreme court stated likewise.[6] A determination that the Fifth Amendment privilege against compelled self-incrimination precludes a prosecutor from arguing that the defendant in a capital case has failed to meet his burden is inconsistent with the rule announced in Walton and will have a substantial impact on capital sentencing schemes throughout the country.

---

[6]Relying on Walton, the court of appeals found no constitutional problem in this allocation of the burden of proof, 925 F.2d at 1553-54 (Appendix B, at 60a-61a).

This Court should issue a writ of certiorari in order to examine the Fifth Amendment implications of a prosecutor's remarks on a convicted murderer's lack of remorse as it relates to mitigating evidence based on his testimony.

2. The writ should issue, as well, to determine if the court of appeals improperly announced a "new rule" on collateral review when it concluded that the Griffin rule applies to argument during the penalty phase of a capital trial.

As noted above, several state and federal courts have upheld the propriety of comments similar to those at issue here despite Griffin.[7] Griffin itself

---

[7]Indeed, the Pennsylvania Supreme Court continues to rely on its first opinion in the case sub judice for the proposition that remorse is a proper consideration in capital sentencing and that a prosecutor's comments on lack of remorse were not (footnote continued)

does "not speak directly, if at all, to the issue presented here," Saffle v. Parks, 110 S.Ct. 1257, 1261 (1990). Griffin was concerned with adverse comment during the guilt phase of a capital trial. The penalty phase presents different considerations.[8] Estelle v. Smith, supra, while it found a violation of the privilege against compelled self-incrimination in the penalty phase of a capital trial, was bound to its "distinct circumstances." Id. at 466. No one could clearly say that Smith applied to

---

[7](Contd.)error. Commonwealth v. Chester, ___ Pa. ____, 587 A.2d 1367 (1991) (decided after the court of appeal's decision in this case).

[8]The court of appeals' reliance on Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1969), cert. denied, 395 U.S. 909 (1969), does not save this case from the Court's holdings in Teague and its progeny. A "collateral" testimony rule created by a panel of a court of appeals is not "well established" for Teague purposes.

a prosecutor's "no remorse" comment after a capital defendant voluntarily testifies at the penalty phase of a capital trial in an attempt to establish mitigating circumstances based on his background and character. In rejecting a similar challenge, the Eleventh Circuit determined that neither Griffin nor Smith resolved the issue. Tucker v. Francis, 723 F.2d 1504, 1509-10 (11th Cir. 1984), aff'd. sub nom. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986).

Announcing this rule on collateral review is contrary to this Court's holdings in Teague v. Lane, 489 U.S. 288 (1989), Butler v. McKellar, 110 S.Ct. 1212 (1990), Saffle v. Parks, 110 S.Ct. 1257 (1990), and Sawyer v. Smith, 110 S.Ct. 2822 (1990). This new rule is within neither of Teague's exceptions.

Butler v. McKellar, supra, at 1216; Sawyer v. Smith, supra, at 2832. The rule announced by the court of appeals is not an "absolute prerequisite to fundamental fairness." Id. Indeed, this Court "has noted that the fifth amendment privilege against adverse comment on silence 'has little to do with fair trial and derogates rather than improves the chances for accurate decisions. Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558 (1976)." Tucker v. Francis, supra, at 1516.

The announcement of this new rule concerning prosecutor's arguments during capital sentencing proceedings has departed from the role of the federal courts in habeas corpus proceedings. This departure, as it calls into question the finality of capital cases after

affirmance on direct review, calls for the exercise of this Court's supervisory power. The writ should issue.

3. The court of appeals' holding that the prosecutor's argument at the penalty phase was improper and rendered the proceeding fundamentally unfair also requires this Court to exercise its supervisory responsibility. On direct review, the Supreme Court of Pennsylvania examined these claims and rejected them. It found that the "no remorse" comment was a proper reference to Lesko's demeanor and was not prejudicial. Appendix N, at 405a-409a. It found that the alleged "appeal to vengeance" was not "inflammatory." Id., at 416a. The court of appeals, reviewing the same facts and applying the same legal standard, found the proceeding fundamentally unfair requiring habeas corpus relief.

In resolving this issue, the court of appeals presumed to apply the standard established by this Court in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). It is clear that the state court applied the same standard in rejecting these arguments, though not couched in terms of a denial of due process. The standard, therefore, appears to be no standard at all.

The appeals court rejected the state supreme court's determination that the "no remorse" comment was a reference to Lesko's demeanor. Appendix B, at 37a-38a. It recognized that, standing alone, the alleged "appeal to vengeance" would not warrant relief under DeChristoforo. Id., at 42a. It held, however, that the combined impact of the Griffin error (which it found) along with the "improper" appeal to vengeance required relief. Id., at 42a and 44a.

In resolving an issue, it is clear that the federal court can grant habeas corpus relief when the state court applies an incorrect legal standard or misapplies the correct legal standard. The same should not be true where the correct standard was properly applied, even if the federal court disagrees with the result. The role of the lower federal courts in administering the writ of habeas corpus is to protect basic rights. They do not sit to review the decisions of the state courts. Allowing such a practice undermines finality and comity. See McCleskey v. Zant, 59 U.S. L.W. 4288 (1991).

This death penalty case gives this Court the opportunity to reevaluate the role of the lower federal courts in reviewing the decisions of the state courts which are bound to the application of the state law and the facts of

the particular case. The writ should issue.[9]

Assuming, arguendo, that the court of appeals properly examined this issue, it erred in determining that the argument rendered the proceeding fundamentally unfair in violation of the Due Process Clause. The argument did not warrant relief under Donnelly v. DeChristoforo, supra. The court below erred, as well, in determining that, in light of the trial court's instructions, the complained of argument was not harmless beyond a reasonable doubt. See Boyde v. California, 110 S.Ct. 1190, 1200 (1990). For these reasons, too, the writ should issue.

---

[9]It should not go unnoticed that "the Court of Appeals reached a conclusion which was in conflict with the conclusion reached by every other state and federal judge after reviewing the exact same record." Sumner v. Mata, 449 U.S. 539, 548-49 (1981).

4. Lastly, this Court should review the court of appeals' decision remanding this case to the district court for an evidentiary hearing on the issue of the voluntariness of Lesko's guilty plea in Indiana County. Lesko raised this issue in state court in his amended motion to withdraw his Indiana County guilty plea. He clearly had the opportunity to present all his proofs on that claim at the hearing on the motion. His counsel did not present testimony on his involuntariness claim based on the allegedly breached plea agreement. Instead, he provided legal argument. The Commonwealth introduced testimony to refute the claim of a breached agreement which was credited by the Indiana County court. Appendix M, at 340a-341a. That court rejected the claim finding the plea to be voluntary. Id., at 338a and 339a. The state supreme court affirmed

after reviewing the record and the arguments of plea counsel. Appendix L, at 328a.

The "proofs" which Lesko now wishes to present to the federal district court were available to him at the time of the hearing on the motion to withdraw his guilty plea. Both he and his counsel could have testified at the hearing.[10] Other witnesses, belatedly identified by plea counsel in the affidavit filed at the direction of the court of appeals, were available and could have testified as well. If the evidence crucial to the consideration of Lesko's claim was not developed at the hearing on the motion

---

[10]His counsel gave the equivalent of testimony in his arguments before the motion court and the supreme court. Despite his continued representation of Lesko at the hearing on the motion, he could have testified at the hearing by the simple expedient of securing additional counsel for purposes of questioning him at the hearing.

it was due to his "inexcusable neglect. "Townsend v. Sain, 372 U.S. 293, 317 (1963).

This Court recently addressed the concept of "inexcusable neglect" in the context of abuse of the writ. McCleskey v. Zant, 59 U.S.L.W. 4288 (1991). The term "inexcusable neglect" was taken from the Court's opinion in Townsend, supra. Townsend addressed the question of when a federal court must hold an evidentiary hearing on a state prisoner's habeas corpus petition. The Townsend court said that the inexcusable neglect standard "does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures." Id., at 317.

In McCleskey, supra, the Court noted "the imprecise contours of the term 'inexcusable neglect.'" Id., at 4296.

It determined "that the [cause and prejudice] standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context." Id. at 4294.

It appears that a hearing is not required in the federal court if the state prisoner deliberately by-passes state procedures. See Townsend v. Sain, 372 U.S. at 317 and compare Vasquez v. Hillary, 474 U.S. 254, 260 (1986) ("the circumstances present no occasion for the Court to consider a case in which the prisoner has attempted to expedite review by deliberately witholding essential facts from the state courts"). Some courts of appeals have apparently limited the Townsend concept of "inexcusable neglect" to "deliberate by-pass." See Smith v. Freeman, 892 F.2d 331, 340 (3d Cir. 1990) (relied on by the court

below); and Streetman v. Lynaugh, 812 F.2d 950, 960 (5th Cir. 1987) ("[i]t is well established that counsel's failure to marshall crucial evidence underlying a federal claim because of insufficient preparation or other neglect does not constitute a deliberate by-pass" under Townsend).

The instant case gives the Court the opportunity to clarify the "inexcusable neglect" standard as it relates to a habeas petitioner's failure or refusal to present all the facts supporting a claim for relief to the state courts in light of the recent decision in McCleskey. The same policies of comity, finality and federalism which underscore the abuse of the writ and procedural default rules apply here. The writ should issue.

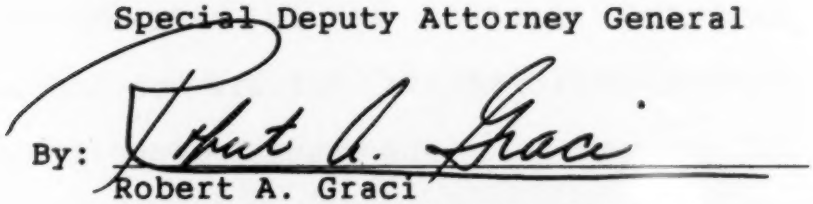
CONCLUSION

For the foregoing reasons, we respectfully request that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

Ernest D. Preate, Jr.
Attorney General

John W. Peck
Special Deputy Attorney General

By: 
Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services Section
(Counsel of Record)

Attorneys for Petitioners

Dated: June 5, 1991